

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CRAIG ALAN CLARK AND CHRISTINA
CLARK,

Plaintiffs,

v.

TRANSPACK CORPORATION; BUCKLEY
& ASSOCIATES, INC.;
TRANSAMERICA HOME LOAN;
WILSHIRE CREDIT CORPORATION;
OCWEN FEDERAL BANK; and DOES 1
through 50, inclusive,

Defendants.

CIV-S-04-0332 DFL PAN

MEMORANDUM OF OPINION
AND ORDER

Plaintiffs Craig and Christina Clark ("the Clarks") sued defendants Transpack Corporation ("Transpack"), Buckley & Associates ("Buckley"), Transamerica Financial Services ("Transamerica"), and Wilshire Credit Corporation ("Wilshire"), for alleged wrongdoing in connection with the foreclosure sale of the Clarks' home. Both sides move for summary judgment or, in the alternative, partial summary judgment. The defendants' motion for summary judgment on the Fair Debt Collection Practices

1 Act, 15 U.S.C. §§ 1692 et seq., (FDCPA) claim is GRANTED. The
2 court declines to exercise supplemental jurisdiction over the
3 remaining state law claims. See 28 U.S.C. 1367(c)(3). The case
4 is remanded to the Sacramento County Superior Court.

5 I.

6 In 1989, the Clarks bought a home located at 209 West
7 Elkhorn Boulevard in Rio Linda, California. (PUF ¶ 3.) In June
8 1992, they borrowed \$49,846.23 from Transamerica. (Id. ¶ 4.)
9 The Clarks secured this loan by executing a deed of trust on the
10 home. (FAC ¶ 11.) Transamerica subsequently lost the promissory
11 note evidencing the terms of the June 1992 loan. (PUF ¶ 8.)

12 In October 1993, the Clarks filed for bankruptcy. (DUF ¶
13 4.) On October 5, 1993, the Clarks reaffirmed Transamerica's
14 lien by executing a Statement of Intention. (Id. ¶ 7.) The
15 bankruptcy court discharged the Clarks' case in January 1994.
16 (Id. ¶ 5.) The Clarks continued to make monthly payments
17 according to the alleged terms of the loan until July 1995.
18 (Virgil Decl. Ex. 15 at 5-8, 19-37.) Beginning in August 1995,
19 the Clarks reduced their loan payments by almost half. (Id.)
20 They paid this reduced amount each month until July 1996. (Id.)
21 At that time, the Clarks stopped making any payments on the loan
22 even though there was an outstanding balance. (Id.)

23 On November 13, 2001, Transamerica sold the loan and deed to
24 Transpack. (Defs.' Opp'n at 4-5.) On November 26, 2001,
25 Transpack substituted Buckley as trustee under the Deed of Trust.
26 (Id. at 5.) On that same day, Buckley recorded with the

1 Sacramento County Recorder a "Notice of Default and Election to
2 Sell Under Deed of Trust" (the "Notice of Default"). (Bowditch
3 Decl. Ex. 2.) On December 3, 2001, Buckley sent the Clarks a
4 debt validation notice indicating the amount owed on the debt
5 (the "Debt Validation Notice"). (Buchanan Decl. Ex. G.) In
6 February 2002, Buckley recorded a "Notice of Trustee's Sale."
7 (Id. Ex. H.) The notice indicated that the sale was scheduled
8 for March 27, 2002. (Id.)

9 Transpack postponed the initial sale from March 27, 2002
10 until April 24, 2002. (Bowditch Decl. ¶ 21.) Both parties then
11 agreed to postpone the sale again from April 24, 2002 until April
12 30, 2002. (Id. ¶ 22.) On April 25, 2002, the Clarks filed a
13 second bankruptcy. (Clark Decl. ¶ 7.) Buckley postponed the
14 sale an additional fourteen times during this bankruptcy.
15 (Bowditch Decl. ¶ 24.) The bankruptcy court dismissed the
16 Clarks' case on January 16, 2003. (DUF ¶ 27.) Buckley held the
17 foreclosure sale on February 5, 2003. (Id. ¶ 29.) Transpack
18 purchased the subject property for \$84,000.00 at the sale. (Id.
19 ¶¶ 29-30.)

20 On February 6, 2003, the Clarks found a "three-day notice"
21 posted on their property. (Clark Decl. ¶ 7.) On February 11,
22 2003 the Clarks filed a third bankruptcy. (DUF ¶ 41.) Transpack
23 moved for relief from the automatic stay. (Id. ¶ 43.) The court
24 granted Transpack's motion on May 20, 2003. (Id.) On June 9,
25 2003, Transpack filed an unlawful detainer action against the
26 Clarks. (Id. ¶ 45.) On September 24, 2003, a Sacramento County

1 Superior Court judge issued Transpack a writ of possession for
2 the subject property. (Id. ¶ 47.) On November 14, 2003,
3 Transpack sold the house to Kukis Home Repair, Inc. for
4 \$161,500.00. (Id. ¶ 48.) The property was sold about six
5 months later for \$256,000. (Clark Decl. at 5.)

6 The Clarks filed the original complaint in Sacramento County
7 Superior Court on June 17, 2003. (DUF ¶ 49.) On October 24,
8 2003, Wilshire removed the action based on the Clarks' single
9 federal claim. (Id. ¶ 50.) The Clarks filed a First Amended
10 Complaint on August 18, 2004. (Id. ¶ 51.) The amended complaint
11 includes one federal and nine state causes of action. (Id.) On
12 May 13, 2005, Wilshire was dismissed with prejudice. (Id. ¶ 53.)
13 On June 10, 2005, the Clarks settled with Transamerica for
14 \$2,500. (Id. ¶ 62.) Transpack and Buckley are the only
15 remaining defendants in this case (collectively "the
16 defendants").

17 II.

18 Both parties seek summary judgment on the Clarks' claim that
19 the defendants violated the FDCPA.¹ (Pls.' Mot. at 13.) The
20 Clarks allege that the defendants violated FDCPA by: (1)
21

22 ¹ In their amended complaint, the Clarks list nine state
23 claims and a federal claim under the FDCPA. (Compl. ¶¶ 54-55.)
24 However, in their summary judgment motion, the Clarks briefly
25 accuse the defendants of violating the Real Estate Settlement
26 Procedures Act, 12 U.S.C. §§ 12601 et seq. (RESPA). This claim
is not included in the complaint. The Clarks did not seek leave
of court to amend the complaint. Fed.R.Civ.P. 15(a). Because
the Clarks did not properly plead this claim, the court will not
consider it.

1 "repeatedly demanding arbitrary and varying amounts of principal
2 and interest and other unexplained amounts" without possession of
3 the actual promissory note; (2) failing to set forth the method
4 of calculating the amount due on the loan; and (3) "obfuscat[ing]
5 their identity and role in their communications" with the Clarks.
6 (Pls.' Mot. at 14.)

7 The defendants argue that they are entitled to summary
8 judgment on the FDCPA claim because none of the alleged
9 violations occurred during the limitations period. (Defs.' Mot.
10 at 26.) Section 1692k(d) requires plaintiffs to bring FDCPA
11 claims "within one year from the date on which the violation
12 occurs." The Clarks filed the original complaint in this action
13 on June 17, 2003. (Notice of Removal Ex. A.) Therefore, the
14 Clarks can only bring claims for violations that occurred on or
15 after June 17, 2002.

16 The Notice of Default, Debt Validation Notice, and Notice of
17 Trustee's Sale were all delivered prior to June 17, 2002.
18 (Buchanan Decl. Exs. E, G, H.) Therefore, the Clarks cannot
19 assert a FDCPA claim based on alleged irregularities in those
20 documents. Although the Trustee's Deed Upon Sale was generated
21 within the limitations period, it is not covered by the FDCPA
22 because the document serves to evidence a sale, not collect a
23 debt. The FDCPA is limited to debt collection activities. See
24 15 U.S.C. § 1692e (prohibiting misleading communications in
25 connection with the collection of a debt); Wade v. Reg'l Credit
26 Ass'n, 87 F.3d 1098, 1099 (9th Cir. 1996) (stating that the FDCPA

1 aims to prevent abusive debt collection practices). Therefore,
2 even if the defendants listed an incorrect amount of debt on that
3 instrument, they did not violate the FDCPA.

4 The Clarks allege no other instance where the defendants
5 declared an incorrect amount due on the loan in an effort to
6 collect the debt.² Similarly, there is no evidence of the
7 defendants making a deceptive communication after June 17, 2002.
8 However, at the hearing on this motion, the Clarks contended that
9 their claim was not barred by the statute of limitations because
10 the defendants engaged in a "course of conduct" after June 17,
11 2002 that deceived the Clarks. This argument also fails.

12 To determine when the limitations period begins to run for
13 an FDCPA claim, courts look to the debt collector's "last
14 opportunity to comply with the [Act]." Mattson v. U.S. West
15 Communications, 967 F.2d 259, 261 (8th Cir. 1992); see also Naas
16 v. Stolman, 130 F.3d 892, 893 (9th Cir. 1997); Maloy v. Phillips,
17 64 F.3d 607, 608 (11th Cir. 1995). For example, if the FDCPA
18 violation is the filing of a meritless collection action in state
19 court, then the statute of limitations begins to run when the
20 debt collector files suit. Naas, 130 F.3d at 893. Similarly, if
21

22 ² In their opposition, the Clarks list two other statements
23 of debt: (1) the First American Title Trustee's Sale Guarantee;
24 and (2) the Notice of Servicing Transfer. The information on
25 these documents does not afford the Clarks a cause of action
26 under the FDCPA because: (1) neither attempts to recover a debt;
27 (2) the defendants did not participate in creating or
28 distributing the Notice of Servicing Transfer; and (3) the sale
29 guarantee was not uncovered until discovery, therefore it could
30 not have misled the Clarks prior to the foreclosure sale.
(Buchanan Decl. Exs. B, D.)

1 the violation is a harassing debt collection letter, then the
2 statute of limitations begins to run when the debt collector
3 mails the letter. Maloy, 64 F.3d at 608. This is true even
4 though the effects of these actions might persist for months or
5 even years.

6 The evidence shows that after June 17, 2002, the defendants:
7 (1) postponed the sale of the property thirteen times; (2)
8 obtained leave from the automatic stay to sell the property; and
9 (3) sold the property. There is no evidence that defendants'
10 "course of conduct" after June 17, 2002 included making any
11 misrepresentations in an effort to collect the debt. Therefore,
12 even if the Clarks were deterred from repaying the loan because
13 it was misstated on the Notice of Default, Debt Validation
14 Notice, or in some other pre-June 17, 2002 communication, their
15 claims under the FDCPA are time-barred.

16 III.

17 Defendants' motion for summary judgment on the FDCPA claim
18 is GRANTED. The court declines to exercise supplemental
19 jurisdiction over the remaining state law claims. The clerk
20 shall: (1) remand the case to the Sacramento County Superior
21 Court, and (2) enter judgment.

22 IT IS SO ORDERED.

23 Dated: 11/11/2005

24 /s/ David F. Levi
25 DAVID F. LEVI
26 UNITED STATES DISTRICT JUDGE